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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In re Application of)	File No. BMPCT-910125KE
RAINBOW BROADCASTING COMPANY)	REC'D MASS MED BUR
For Extension of)	MAR 14 1991
Construction Permit)	
To: The Commission		VIDEO SERVICES

Opposition to Press Petition for Reconsideration

On February 25, 1991, Press Television Corporation (Press) filed a Petition for Reconsideration, seeking reconsideration of the February 5, 1991 modification of Rainbow Broadcasting Company's construction permit (File No. BMPCT-910125KE) to extend time to complete construction. As discussed below, Press lacks standing to seek reconsideration of the action and its Petition in any event raises no substantive question requiring Commission enquiry.

Press Lacks Standing in this Proceeding. Press Television Corporation unsuccessfully sought to interpose an "Informal Objection" to grant of Rainbow's extension request. Press filed its "Informal Objection" on February 15, 1991, ten days after Rainbow's application had been granted and three days after issuance of the Public Notice, Report No. 21047, February 12, 1991. Having failed

in its informal effort, Press resubmitted its untimely informal objection, explaining that it "formally seeks reconsideration of the grant for all of the reasons set forth in its [informal] Objection," which it appended and "incorporated by reference." Without elaboration, Press asserts that its "petition fully complies with section 1.106, which governs the filing of petitions for reconsideration."

Only the second half of this recitation is correct; Section 1.106 indeed governs reconsideration, but the Press petition fatally ignores its requirements. Section 1.106(b) permits reconsideration to be sought by "any party to the proceeding" or "any other person whose interests are adversely affected" by the Commission's action, but requires that non-parties such as Press "state with particularity the manner in which the person's interests are adversely affected" by the Commission's challenged action. Press' failure to make this requisite showing of standing requires dismissal of its Petition for Reconsideration on jurisdictional grounds.^{1/}

1/ Press' suggestion (Informal Objection, note 2) that it has standing as a potential competing television operator in the Orlando area fails to meet the requirement that it demonstrate how grant of Rainbow's extension request will "aggrieve" Press. Rather, it suggests that what Press seeks here is relitigation of the underlying actions allocating Channel 65 to Orlando and granting a construction permit to Rainbow, both long since final.

Nor is failure of compliance with Section 1.106(b) the only fatal flaw in Press' standing claim, for those who participate as informal objectors are denied standing to seek reconsideration, Redwood Microwave Association, Inc., 61 F.C.C.2d 442, 443 (1976); Max M. Leon, Inc., 58 F.C.C.2d 114, 115 (1976). Simply stated, a party without standing may file an informal objection under Commission Rule 73.3587 (if it is timely, as Press' of course was not), but it does not thereafter elevate its status to that of a person with standing by filing a petition for reconsideration. Thus, while Press here failed to file a timely Informal Objection, even a timely filing would not have conferred standing to file the present Petition for Reconsideration.

Press' Substantive Arguments Are Without Merit. Assuming Press' substantive arguments could be considered, its Petition would nonetheless be fruitless for they are without merit. Press asserts that (1) Rainbow failed to make the requisite showing in support of its extension request under Rule 73.3534; and (2) Rainbow's basic qualifications should be examined before an extension of its construction permit is granted. Both contentions are

Press has no legitimate interest in Rainbow's requested extension, sought some four months after judicial affirmation of the Commission's grant.

meritless and seek only to involve the Commission in private contractual litigation between Rainbow and the owner of the Bithlo Tower, currently pending in the United States District Court for the Southern District of Florida, Rey v. Guy Gannett Publishing Co., Case No. 90-2554.

The central issue in that litigation is whether Gannett, the owner of the Bithlo Tower, has infringed upon Rainbow's lease by its stated intention to lease antenna space to Press within the antenna slot which it leased to Rainbow on an exclusive basis in 1986 and for which Rainbow has already paid over \$200,000 in rent. Press, which is not a party to that litigation, has sought Commission approval of a Channel 68/18 frequency swap on the basis of its claimed right to locate in Rainbow's antenna slot (a location essential to its compliance with the Commission's coverage requirements). When Rainbow urged lack of a site as a fatal impediment to the proposed channel swap, the Commission declined to involve itself in this controversy, noting that it is a matter to be resolved privately between the tower owner and the permittee.^{2/}

2/ Traditionally, the Commission has declined to adjudicate private contractual disputes. McAlister Television Enterprises, Inc., FCC 86-334, 60 R.R.2d 1379, 1383-1384. Thus precedent as well as prudence and the Commission's own earlier ruling on the same matter dic-

Report and Order, 4 FCC Rcd. 8320 (MM Bur. 1989). Press' effort to attack Rainbow's construction authorization is simply an improper effort to enlist the aid of the Commission and its processes in depriving Rainbow of the legitimate use of its antenna site.

The grant of Rainbow's construction permit extension was in full compliance with Section 73.3534 and related precedent. On August 30, 1990, the United States Supreme Court finally upheld the Commission's grant of the Channel 65, Orlando, television authorization to Rainbow. Order, Attachment A hereto. Rainbow immediately undertook preparation for construction: a construction engineer was hired; the site owner was informed of Rainbow's intention to proceed with construction (see Memo from Doug Holland to Rick Edwards, Attachment B hereto); and on November 2, 1990, Rainbow initiated legal action (Rey v. Guy Gannett, supra) to prevent the impending infringement of its leasehold by another broadcaster.

Technically, Rainbow's construction permit expired four months after completion of judicial review of its grant. As a practical matter, Rainbow has not yet been afforded the 24 months to construct its facility contem-

tates rejection of Press' effort to involve the Commission in the contract dispute between Rainbow and Gannett.

plated by Rule 73.3598. Moreover, its inability to complete construction has been due to circumstances excusable under Rule 73.3534(b) as clearly beyond its control.

It is Commission practice to grant extensions of time to construct facilities when, as here, the permittee has diligently pursued construction and put substantial financial resources into the effort, but has been delayed by circumstances beyond its control. See FBC, Inc., 3 FCC Rcd. 4595, 65 R.R.2d 263 (MM Bur. 1988); cf. New Orleans Channel 20, Inc. (WULT-TV), 104 F.C.C.2d 304, 60 R.R.2d 820 (1986). Press' effort to cast Rainbow's diligent pursuit of construction of its facilities as improper is baseless. The fact that Rainbow does not choose to abandon the lease exclusivity to which it is entitled is no more "anticompetitive" than the choice not to share one's apartment with a stranger would be "antisocial".^{3/}

The second prong of Press' assault seeks to reopen Rainbow's Channel 65 authorization. To this end, Press

^{3/} Contrary to Press' assertions, Rainbow does not object to competing with Press-- even with Press' antenna located on the remaining slot on the Bithlo Tower; Rainbow does object to sharing its antenna slot, for which it has paid rent for 5 years to retain exclusivity. Press has known since 1988, when the matter was first raised before the Commission, that Rainbow contests its right to share Rainbow's antenna space. Press' effort to cast the contract dispute as an effort by Rainbow to subvert legitimate competition is as persuasive as the efforts of Cinderella's sisters to fit into the glass slipper.

offers, without benefit of factual support, a cornucopia of allegations in support of its assertion that Rainbow's authorization should be set for hearing to explore its financial qualifications, "anticompetitive behavior", comparative preferences, abuse of process and lack of candor/misrepresentation. While none of these issue requests is accompanied by the showing requisite to a petition to deny under Rule 73.3584 (b), Rainbow will briefly address the defects of each.

In seeking to question Rainbow's financial qualifications, Press asserts that if Rainbow is exploring the possibility of equity financing, it must have "lost" its application financing. In short, Press relies solely upon surmise from its own speculation. Such a showing falls woefully short of the standard for prima facie showing embodied in either Rule 73.3584(b) or 1.229(b). Nothing precludes Rainbow from availing itself of alternative financing, a common occurrence for new stations.

Likewise, Press' charge that Rainbow has abandoned the ownership structure upon which, inter alia, its comparative preference was based, is supported by nothing more than Press' assertion (Informal Objection, page 14) that "some change in Rainbow's ownership structure may be imminent." From this small acorn of speculation, Press

attempts to conjure a mighty oak of possible "undisclosed principals" and "withheld disclosure" without benefit of fact or evidence. In response to Press' wild allegations Rainbow can only attest that there has been no change in its comparative posture or ownership structure. Should Rainbow utilize the equity financing available to it, it will make such timely disclosure to the Commission as the rules require.

Press' allegations of abuse of process and anticompetitive behavior stem entirely from pique that Rainbow insists upon the antenna space exclusivity to which its lease entitles it.^{4/} Rainbow has objected in the past and continues to object to Press' reliance on an asserted right to use Rainbow's antenna space as a basis for seeking Commission approval of its 68/18 channel swap and its license application for Channel 18. Rainbow's objections and its legitimate pursuit of those objections can hardly be said to constitute culpable behavior. Both the Review Board (Naguabo Broadcasting Company, FCC 91R-10, released

^{4/} There are multiple antenna spaces on the Bithlo Tower. Rainbow claims only that it is entitled to the exclusivity for which it has paid since 1986 with respect to the top slot. See Informal Objection, Attachment A, Exhibit C. Rainbow has no objection to Press' use of any of the remaining antenna spaces on the tower or to Press' construction of its own tower on the nearby available land.

February 19, 1991) and the Commission (PZ Entertainment Partnership, L.P., FCC 91-47, released February 26, 1991) have recently had occasion to reject the argument, urged here by Press, that the filing of legitimate objections can somehow be used to punish the objector.

In Naguabo, at paragraph 36, the Board observed:

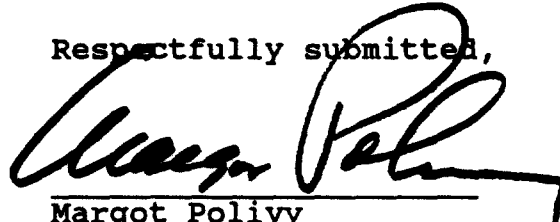
We rebuff outright the nostrum that the economic impact on WALO(AM), Archilla disclosed an "improper motive" for the Rio Grande counterproposal. [foot-note omitted] The FCC is not a kindergarten, and it can be assumed that most of those opposing an allotment or tendering a counterproposal have some economic interest in so doing. See Mt. Wilson FM Broadcasters, Inc. v. F.C.C., 884 F.2d 1462 (D.C. Cir. 1989); Amor Family Broadcasting Group [v. F.C.C.], 918 F.2d 960 (D.C. Cir. 1990)]. Indeed, the potential of economic injury is a prime basis for legal standing to take a position in a broadcast proceeding, and profoundly legitimate. Mt Wilson; FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 476 (1940); Orange Park Florida TV, Inc. v. FCC, 811 F.2d 664, 673 (D.C. Cir. 1987). It would be supremely anomolous were we to find that a legitimate basis for standing at the threshold is, at the same time, an illegitimate bsis for the substantive position advanced. The suggestion otherwise is jejune: were all parties with an economic interest enjoined to avoid any FCC proceeding that threatened that interest, the bustling cityscape of M Street, N.W., Washington, D.C. would transmogrify into moonscape--overnight.

CONCLUSION

For the reasons stated above, Press' Petition for Reconsideration should be dismissed for want of standing; for procedural deficiency under Rule 1.106(b); and because Rainbow's extension of time to construct was in

accord with Rule 73.3534 and related Commission precedents.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Margot Polivy', written over a horizontal line.

Margot Polivy
RENOUF & POLIVY
1532 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 265-1807

Counsel for Rainbow
Broadcasting Company

12 March 1991

ATTACHMENT A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 30, 1990

Ms. Margot Polivy
Renouf & Polivy
1532 Sixteenth Street, NW
Washington, DC 20036


Re: Metro Broadcasting, Inc.
v. Federal Communications Commission, et al.
No. 89-453

Dear Ms. Polivy:

The Court today entered the following order in the above
entitled case:

The petition for rehearing is denied.


Very truly yours,


Joseph F. Spaniol, Jr., Clerk

ATTACHMENT B

cottrill & holland, inc.

technical consultants and planners.
(305) 522-3303 • (305) 522-3355 FAX

Date: November 5, 1990
To: Rick Edwards
Gannett Tower Company
From: Doug Holland 
Re: WRBW Building Cost Estimates

Please forward copies of contractors bids for the new transmitter building at Bithlo. Joe Rey has asked me to review them when you have them available. I understand that Joe has elected to occupy the middle room.

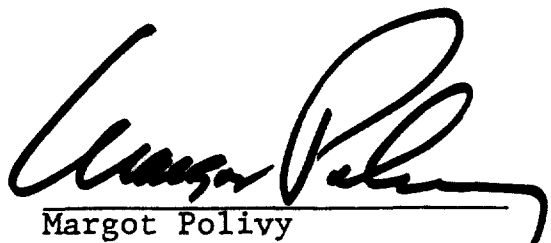
Once Joe has given me the go-ahead, we will supply you with the electrical and HVAC specifications, so that they may also be bid by your contractors.

If you have any questions, please feel free to call. Thanks for your help with this Rick.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Opposition to Press Petition for Reconsideration" was sent first class mail, postage prepaid, this twelfth day of March 1991 to:

Harry F. Cole, Esquire
Bechtel & Cole, Chartered
2101 L Street, N.W., Suite 502
Washington, D.C. 20037



Margot Polivy